

**In re: RAFAEL DOMINGUEZ, d/b/a LA BODEGA WHOLESALE
FOODS & LATINA AMERICAN GROCERY.
P.Q. Docket No. 00-0017.
Order Denying Petition for Reconsideration filed April 19, 2001.**

**Petition for reconsideration – Avocados – Statutes at large constructive notice – Federal
Register constructive notice.**

The Judicial Officer denied the Respondent's Petition for Reconsideration. The Judicial Officer rejected the Respondent's contention that his lack of knowledge of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff should affect the disposition of the proceeding. The Judicial Officer stated the Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code, and the Respondent is presumed to know the law. The Judicial Officer also stated the regulations prohibiting the interstate movement of Mexican Hass avocados from Illinois to Missouri are published in the *Federal Register*, thereby constructively notifying the Respondent of the prohibition on the movement of Mexican Hass avocados from Illinois to Missouri.

James D. Holt, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Chief Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 15, 2000. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].¹

Complainant alleges that: (1) on or about November 24, 1999, Rafael Dominguez, d/b/a La Bodega Wholesale Foods & Latina American Grocery

¹ Section 438(a) of the Plant Protection Act, enacted June 20, 2000, repealed the Plant Quarantine Act and the Federal Plant Pest Act. However, section 438(c) of the Plant Protection Act states "[r]egulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary [of Agriculture] issues a regulation under section 434 that supercedes the earlier regulation."

[hereinafter Respondent], moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; (2) on or about November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; (3) on or about November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff; and (4) on or about December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶¶ II-V).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 21, 2000.² Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter, dated October 12, 2000, stating that an answer to the Complaint had not been filed within the allotted time.

On October 19, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order and a service letter on October 27, 2000.³ Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Respondent a letter, dated November 22, 2000, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration and decision.

On December 1, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on November 24, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri; (2) finding that on November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun

² See Domestic Return Receipt for Article Number P368330859.

³ See Domestic Return Receipt for Article Number P368327605.

Restaurant, Arnold, Missouri; (3) finding that on November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri; (4) finding that on December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri; (5) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff; and (6) assessing Respondent a \$6,000 civil penalty (Initial Decision and Order at 3, 5).

On January 4, 2001, Respondent appealed to the Judicial Officer. On February 20, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On February 22, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On February 26, 2001, I issued a Decision and Order: (1) finding that on or about November 24, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to La Bodega Wholesale Foods, St. Louis, Missouri; (2) finding that on or about November 29, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to Cancun Restaurant, Arnold, Missouri; (3) finding that on or about November 30, 1999, Respondent moved two boxes of Mexican Hass avocados from Chicago, Illinois, to La Mexicana Grocery, St. Anns, Missouri; (4) finding that on or about December 7, 1999, Respondent moved one box of Mexican Hass avocados from Chicago, Illinois, to Latina American Grocery, St. Louis, Missouri; (5) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff; and (6) assessing Respondent a \$6,000 civil penalty. *In re Rafael Dominguez*, 60 Agric. Dec. ___, slip op. at 9, 16 (Feb. 26, 2001).

On March 23, 2001, Respondent filed a petition for reconsideration. On April 16, 2001, Complainant filed Complainant's Response to Respondent's Request for Reconsideration. On April 18, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the February 26, 2001, Decision and Order.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 7B—PLANT PESTS

....

§ 150gg. Violations

....

(b) Civil penalty

Any person who—

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

....

may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

....

**CHAPTER 8—NURSERY STOCK AND OTHER PLANTS
AND PLANT PRODUCTS**

....

§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty

. . . Any person who violates any . . . rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT
OF AGRICULTURE**

....

**CHAPTER III—ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

....

PART 301—DOMESTIC QUARANTINE NOTICES

Subpart—Imported Plants and Plant Parts

....

**§ 301.11 Notice of quarantine; prohibition on the interstate
movement of certain imported plants and plant parts.**

(a) In accordance with part 319 of this chapter, some plants and plant parts may only be imported into the United States subject to certain destination restrictions. That is, under part 319, some plants and plant parts may be imported into some States or areas of the United States but are prohibited from being imported into, entered into, or distributed within other States or areas, as an additional safeguard against the introduction and establishment of foreign plant pests and diseases.

(b) Under this quarantine notice, whenever any imported plant or plant part is subject to destination restrictions under part 319:

....

(2) No person shall move any plant or plant part from any such quarantined State or area into or through any State or area not quarantined with respect to that plant or plant part.

....

PART 319—FOREIGN QUARANTINE NOTICES

....

Subpart—Fruits and Vegetables

Quarantine

....

**§ 319.56-2ff Administrative instructions governing movement of
Hass avocados from Mexico to the Northeastern United States.**

Fresh Hass variety avocados (*Persea americana*) may be imported from Mexico into the United States for distribution in the northeastern United States only under a permit issued in accordance with § 319.56-4, and only under the following conditions:

(a) *Shipping restrictions.* . . .

....

(3) The avocados may be distributed only in the following northeastern States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

....

(c) *Safeguards in Mexico.* . . .

....

(3) *Packinghouse requirements.* The packinghouse must be registered with Sanidad Vegetal's avocado export program and must be listed as an approved packinghouse in the annual work plan provided to APHIS by Sanidad Vegetal. The operations of the packinghouse must meet the following conditions:

....

(vii) The avocados must be packed in clean, new boxes. The boxes must be clearly marked with the identity of the grower, packinghouse, and exporter, and the statement "Distribution limited to the following States: CT, DC, DE, IL, IN, KY, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI."

7 C.F.R. §§ 301.11(a), (b)(2), 319.56-2ff(a)(3), (c)(3)(vii).

**CONCLUSIONS BY THE JUDICIAL OFFICER
ON RECONSIDERATION**

Respondent raises one issue in his March 16, 2001, letter to Mr. William [hereinafter Petition for Reconsideration]. Respondent contends he was not

aware of the Plant Quarantine Act or the Federal Plant Pest Act (Pet. for Recons.).

The Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code, and Respondent is presumed to know the law.⁴ Moreover, the regulations prohibiting the movement of Mexican Hass avocados from Illinois to Missouri are published in the *Federal Register*; thereby constructively notifying Respondent of the prohibition on the movement of Mexican Hass avocados from Illinois to Missouri.⁵ Therefore, Respondent's lack of actual knowledge of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

For the foregoing reasons and the reasons set forth in *In re Rafael Dominguez*, 60 Agric. Dec. ____ (Feb. 26, 2001), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.⁶

⁴ See *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

⁵ See *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), cert. denied, 396 U.S. 867, and cert. denied, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).

⁶ *In re William J. Reinhart*, 60 Agric. Dec. ____, slip op. at 35-36 (Jan. 23, 2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 647 (2000) (Order Denying Respondent's Pet. for Recons.); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re David Tracy Bradshaw*, 59 Agric. Dec. 790, 793 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299

Respondent's Petition for Reconsideration was timely filed and automatically stayed the February 26, 2001, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed February 26, 2001, is reinstated: except that the date within which payment of the civil penalty was required to be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, in the February 26, 2001, Order, is the date indicated in the Order in this Order Denying Petition for Reconsideration.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent is assessed a \$6,000 civil penalty. The civil penalty shall be paid by certified checks or money orders, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall make payments of \$500 each month for 12 consecutive months. Respondent's initial payment of \$500 shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. If Respondent is late in making any payment or misses any payment, then all

(1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

remaining payments become immediately due and payable in full. Respondent shall state on each certified check or money order that payment is in reference to P.Q. Docket No. 00-0017.
